

RECENT CASES

Paramount Pictures is not entitled to include copyrighted song in videocassettes of "Medium Cool" because synchronization license authorized song's use only for theatrical and television exhibition

A synchronization license granting H&J Pictures the right to use the song "Merry-Go-Round" in the film "Medium Cool" and to exhibit the film in theaters and television did not include the right to use the song in videocassettes of the film, a Federal Court of Appeals has held.

Herbert Cohen, the copyright holder in the song, which was written by Larry ("Wildman") Fischer, granted the synchronization license to H&J in 1969. Subsequently, H&J assigned its rights, title and interest in "Medium

Cool" to Paramount Pictures. Paramount eventually manufactured and sold about 2700 videocassettes of the film, receiving a gross revenue of about \$69,000 from the sales.

When Cohen sued Paramount for copyright infringement, the District Court granted Paramount's motion for summary judgment. In reversing the District Court's decision, Judge Proctor Hug set forth the relevant language of the license, which began by granting H&J the "authority ... to record, in any manner, medium, form or language, the words and music of the musical composition ... with ['Medium Cool'], all in accordance with the terms, conditions, and limitations hereinafter set forth ... " Paragraph 4 of the license stated, "The ... license herein granted to perform ... said musical composition is granted for: (a) The exhibition of said motion picture ... to audiences in motion picture theaters ... (b) The exhibition of said motion picture ... by means of television

..., including 'pay television,' 'subscription television' and 'closed circuit into homes' television..." And in paragraph 6, the license reserved to the grantor "all rights and uses in and to said musical composition, except those herein granted to the Licensee ... "

Paramount argued that the right to use the composition in connection with a videocassette reproduction of "Medium Cool" was conferred by the language granting H&J the authority to record "in any manner, medium, form or language" the composition with the film. The grant was expressly subject to the limitations set forth in the license, noted Judge Hug.

The court next rejected the argument that videocassette display was equivalent to "exhibition ... by means of television." It was observed that the exhibition of a film on television differs fundamentally from exhibition by means of a videocassette recorder-television requires an intermediary network, station, or cable to send signals

into viewers' homes; viewers using a conventional television set cannot record any part of the television display; and television signals are "ephemeral and beyond the viewer's grasp." On the other hand, viewers have complete discretion with respect to videocassettes.

Furthermore, a primary reason why the phrase "exhibition by means of television" did not include videocassette reproduction was that videocassette recorders for home use were not invented or known in 1969, when the license was executed. Cohen anticipated that viewer access to the film would be controlled by theaters and networks. H&J could not have bargained for, or paid for, the rights associated with videocassette reproduction, declared Judge Hug, and thus was not entitled to "reap the entire windfall" associated with the new medium, particularly since paragraph 6 of the license precluded uses not then known to, or contemplated by the parties.

Judge Hug went on to find that the purposes underlying federal copyright law would not be served were the court to construe the license as granting a right in a medium which was not available at the time the license was granted.

The court distinguished the case of *Platinum Record Company, Inc. v. Lucasfilm, Ltd.*, 556 F.Supp. 226 (ELR 6:1:8), in which the license granting Lucasfilm the right to use four songs on the soundtrack of the film "American Graffiti" expressly included the right to "exhibit, distribute, exploit, market and perform said motion pictures, its air, screen and television trailers, perpetually throughout the world by any means or methods now or hereafter known." (Emphasis added.) Also distinguished was *Rooney v. Columbia Pictures Industries, Inc.*, 538 F.Supp. 211 (ELR 4:7:5) *aff'd*, 714 F.2d 117, *cert.denied*, 460 U.S.1084, in which the contracts at

issue, like the contract in Platinum, contained "sweeping language" in granting rights to exhibit certain films.

Cohen v. Paramount Pictures Corp., Case No.87-6093
(9th Cir., April 27, 1988) [ELR 9:12:3]

**Gore Vidal agrees to settle litigation arising from
Writers Guild arbitration concerning screenplay
credit for "The Sicilian;" one week after settlement,
California appellate court upholds trial court ruling
ordering Guild to disclose names of arbitrators**

A California appellate court has ruled that the Writers Guild of America, West, Inc. must reveal the names of the three arbitrators who determined that Steve Shagan, rather than Gore Vidal, was entitled to a screenplay credit for the film "The Sicilian."

Judge Mildred L. Lillie noted that Vidal, Shagan and the film's director, Michael Cimino, participated in writing the screenplay for the film, which was based on a novel written by Mario Puzo. In October 1986, Gladden Entertainment informed the Guild that principal photography on the film was completed and requested the Guild to conduct a credit determination.

The general rules of credit determination and advertising of credits are set forth in the Guild's collective bargaining agreement with employers. The procedures for arbitrating credit disputes appear in the Guild's "Credits Manual;" the manual is not part of the collective bargaining agreement, but has been approved by the Guild's board of directors and membership.

The credits manual provides that the arbitrators may receive written scripts and written statements from each participant. A credit arbitration secretary then formulates a statement of the issues to be determined, and

each arbitrator issues a decision, apparently, observed Judge Lillie, without consulting with the other arbitrators. A "credit consultant" is available to the arbitrators for information on policy, rules and procedures and is expected to "aid the [arbitrators] toward a majority decision" The credit arbitration secretary obtains the decision of each arbitrator, and, if the decision is not unanimous, accepts the majority decision as final.

On December 31, 1986, each of the three arbitrators decided that Shagan was entitled to a sole screenplay credit. The decision was confirmed by a Policy Review Board; the Board considers whether, in the course of the credit arbitration, there has been "any serious deviation from the policy of the Guild" or the credit manual procedures, and usually will review issues such as "dereliction of duty of the arbitrators, undue influence on the arbitrators, the arbitrators' misinterpretation or violation of Guild policy, and the existence of important new written

material previously not available to the arbitrators" The Board may direct the original arbitrators to reconsider the matter, or direct the arbitration secretary to form a new panel.

In February 1987, Vidal sought to vacate the arbitration award, alleging that he still was rewriting the film and was its primary, albeit not first, author. Vidal also claimed that the arbitrators failed to follow Guild rules by not considering the "qualitative significance" of the various writers; that in view of the ongoing rewriting and editing of the film, the contributions of the writers would change, most likely with an increased use of Vidal's work; that the Guild did not consider the material that was included in the film at the time of the arbitration; and that the premature determination of credit was due to pressure by Shagan, an active Guild member.

Vidal further alleged that the arbitration award was procured by fraud and mistake; that an outline for the

film was withheld from the arbitrators, and that the outline would have demonstrated that Shagan's contributions to the screenplay was less than represented to the arbitrators; that Shagan's name was misleadingly placed on the cover page of the final screenplay; that Vidal's name was deleted from early drafts and that those drafts were not given to the arbitrators; that the arbitrators were partial and biased in favor of Shagan; and that there were improper contacts and communications (by unspecified parties) with the arbitrators.

The Guild and Shagan, in addition to denying Vidal's allegations, asserted that the complaint was barred because Vidal did not pursue intraunion remedies.

In interrogatories sent to the Guild, Vidal sought to discover the names of the arbitrators who participated in determining the writing credit for "The Sicilian" Vidal asserted that the arbitrators would be crucial witnesses to the issues of improper contacts, bias, misconduct or

fraud with respect to the documents submitted to them. When the Guild objected to the interrogatory, Vidal filed a motion to compel an answer.

The trial court, in September 1987, denied the motion. However, upon reconsideration, Judge Miriam Vogel granted the motion to compel (ELR 9:8:18), stating that she had been under the misimpression that the arbitration rules were written. Neither the collective bargaining agreement nor the credits manual require the nondisclosure of the identity of arbitrators; the Guild has chosen to follow this practice since the 1940s.

In a December 1987 minute order denying a motion for reconsideration filed by the Guild and Shagan, Judge Vogel observed that since the Guild's procedures were not formalized, they might vary from member to member according to the amount of time a writer belonged to the Guild, i.e., a more recent member might not have absorbed the "custom and usage" This, stated the court,

"ought not to be dispositive of an issue of this magnitude."

On appeal, Judge Lillie first rejected the argument that the Guild's system of credit arbitration has become part of the collective bargaining agreement, so that the order compelling disclosure would violate the policy of federal labor law prohibiting courts from setting aside a provision of such an agreement. The trial court was not asked to decide Vidal's rights under the collective bargaining agreement, or any other agreement, and the discovery order, emphasized Judge Lillie, did not indicate that the court determined Vidal's rights as to any particular arbitration procedure.

Judge Lillie then found that the court could not properly rule on the validity of the Guild's asserted affirmative defense pertaining to the exhaustion of administrative remedies. It was noted that the trial court did not attempt to adjudicate the defense, and that the

parties were entitled to conduct discovery on the issue for there was at least an arguable question as to whether or not the appeal procedure provided rights which were "merely illusory" or gave Vidal an adequate opportunity to raise any of the limited matters the Board was empowered to consider.

The Guild also asserted the right of privacy on behalf of the nonparty arbitrators under Article 1, section 1, of the California Constitution. The Guild argued that the disclosure of the arbitrators' names could destroy their ability to obtain future employment in the entertainment industry, and could subject them to retribution by the producers of the "The Sicilian," by Vidal, or by Vidal's attorney (Bertram Fields), "a prominent entertainment lawyer and dealmaker within the industry."

Judge Lillie cautioned that the scope of the arbitrators' limited and nonabsolute right of privacy depended on the role they play in the entire procedure set up by the

Guild to handle credit disputes. However, any such right had to accommodate the compelling interests of the public and Vidal in determining the truth in connection with a legal proceeding. If Vidal was prevented from inquiring into the communications and documents received by the arbitrators, as well as their purported prejudices or bias, his ability to pursue his judicial remedies would be impaired, observed the court, and this would be so "whether or not the Credits Manual or some other document explicitly spelled out the requirement that the names of the arbitrators were to be confidential, and whether or not Vidal expressly or impliedly agreed to be bound by such rule."

The Guild as a whole has an interest in the integrity and fairness of the arbitration procedures-its remedy to vindicate that interest would be illusory if a writer could not obtain the names of the arbitrators. Furthermore, the practice of keeping the identity of the arbitrators

confidential serves to insulate them from any attempts at undue influence or improper communications, in addition to maintaining their privacy rights.

Judge Lillie rejected the Guild's claim that allowing the disclosure of the identities of arbitrators would mean that no one would agree to serve in that role given the possible risk of harm to future employment. The credits manual promises all writers a fair and equitable determination of credits as well as certain procedures and appeal rights to vindicate the credit determination. Judge Lillie was not willing to tolerate a risk that a writer might be improperly denied due credit, given the fact that the Guild itself considers the accuracy and fairness of its credit determination "of paramount value."

The trial court therefore did not abuse its discretion in impliedly finding that Vidal's interest in discovery outweighed the interest of the arbitrators in confidentiality. Vidal, as well as his attorneys, must be able to learn the

arbitrators' name in order to assist in discovering any prejudice or bias against him. And Vidal's interest in disclosure was substantial enough to outweigh any risk of retribution that the arbitrators might claim to face from Vidal or his attorney.

The court stated that in response to the argument that the arbitrators might face repercussions from producers and others in the entertainment industry, it gave "serious consideration" to restricting the scope of disclosure. But the names undoubtedly will become a matter of public record. Given the real risk to Vidal of not being able to continue with his lawsuit, the court found in favor of disclosure and agreed that the Guild should be compelled to answer Vidal's interrogatory.

According to news reports, Vidal, the Guild and Shagan have settled the lawsuit, and the Guild filed a notice of settlement and withdrawal of its petition for appeal on

April 5th. Nevertheless, the court proceeded to issue its ruling on April 12th.

Writers Guild of America, West, Inc. v. Superior Court, Case No. B031935 (Ca.Ct.App., April 12, 1988) [ELR 9:12:3]

Increased earning capacity of actress Marisa Berenson was marital property subject to equitable distribution, rules New York trial court

A New York trial court, in allocating marital property upon the dissolution of the marriage of actress Marisa Berenson and attorney Richard Golub, has found, in part, that the increase in value of Berenson's acting and modeling career during the parties' six year marriage was marital property subject to equitable distribution.

Acting Judge Jacqueline Silbermann noted the "tremendous potential for financial gain from the commercial exploitation of famous personalities." Finding an analogy between the right of publicity and professional goodwill, the court pointed out that in either case, the right was an income producing source. It was further observed that "when a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the good will of a business" It did not appear to the court that there was a rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income. Thus, in determining the value of marital property, all income generating assets should be considered, declared the court, if they accumulated while the marriage endured. Judge Silbermann held that "the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has

enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution."

However, in this case, notwithstanding Golub's management of Berenson's financial affairs, the court declined to make an equitable distribution of the asset, noting that no evidence was offered as to the value of Berenson's career and/or business, and that Golub apparently did not give up his own career opportunities to assist Berenson.

The increase in the value of Golub's law practice also was characterized as marital property. And while Berenson did not assist Golub in his law practice, Judge Silbermann nevertheless found that the actress' celebrity was a factor in attracting media attention to the couple; that such attention contributed to the increase in the value of Golub's practice; and that Berenson therefore was entitled, among other assets subject to distribution,

to ten per cent of the increase in the value of Golub's practice-\$10,840.

Golub v. Golub, New York Law Journal, p.7, col.1
(N.Y. Cnty., Mar. 18, 1988) [ELR 9:12:5]

Perfume maker obtains limited injunctive relief in connection with competing distribution of "Elizabeth Taylor's Passion" fragrance

A Federal District Court in New York has granted perfume maker Annick Goutal a preliminary injunction in connection with the distribution of the fragrance "Elizabeth Taylor's Passion."

It was first found that Goutal's "Passion" mark was suggestive and deserving of protection in the absence of secondary meaning. Judge Sweet then reviewed the

factors relevant to determining whether consumers were likely to be confused as to the origin of the products, and found that based on the suggestive nature of the mark, the mark's secondary meaning, and third-party usage, "Passion" was not undeserving of protection. There was little similarity in the physical packaging of the products. Goutal had not yet entered the mass department store market where the Taylor product initially was sold, but it appeared that stores such as Neiman-Marcus were beginning to sell the Taylor fragrance-the products therefore were in direct competition in these stores. Goutal's evidence of actual consumer confusion was "scant", and Taylor, while not demonstrating the utmost good faith, did not adopt the "Passion" name in an attempt to bootstrap sales of her products onto sales of Goutal's products, noted the court.

In all, Goutal, although not demonstrating a loss of sales, did show some likelihood of confusion,

particularly among customers of "first-tier" stores. In order to serve the Lanham Act's purpose of promoting competition, protecting businesses from unfair competition, and serving the interests of consumers, the court granted limited injunctive relief to Goutal enjoining Taylor from marketing "Elizabeth Taylor's Passion" in "first-tier" stores, such as Bergdorf-Goodman, Nieman-Marcus, 1. Magnin, Henri Bendel and stores of comparable quality. Judge Sweet suggested that the parties attempt to agree upon the stores to be covered by the injunction.

Elizabeth Taylor Cosmetics Company, Inc. v. Annick Goutal, S.A.R.L., 673 F.Supp. 1238 (S.D.N.Y. 1987) [ELR 9:12:5]

William Saroyan's children are sole owners of renewal copyright in "The Cave Dwellers," rules Federal District Court in New York, despite author's bequest of rights to charitable foundation

Lucy and Aram Saroyan were entitled to renew the copyright in the play "The Cave Dwellers," written by their father William Saroyan, a Federal District Court has ruled.

William Saroyan copyrighted the play in 1958. Saroyan died in 1981. In his will, the author left the major part of his estate, including "all copyrights, rights to copyright and literary property in published or unpublished work," to the William Saroyan Foundation. When the Foundation challenged the renewal of the copyright in the play by Saroyan's children, they sought a declaratory judgment recognizing their sole ownership of the renewal copyright.

In granting summary judgment to Lucy and Aram Saroyan, Judge MacMahon found that the bequest of renewal rights to the Foundation was "without effect" because the renewal rights never became part of the estate. The Foundation's allegation that Saroyan was estranged from his children was immaterial. Also rejected was the argument that Congress intended renewal rights to benefit only "dependent relatives." The renewal provision of the Copyright Act is non-discretionary, stated Judge MacMahon, who declined to read new individualized criteria into the statute.

Saroyan v. William Saroyan Foundation, 675 F.Supp. 843 (S.D.N.Y. 1987) [ELR 9:12:6]

Competing claims to ownership of extended term of copyright to song "Cecilia" are resolved by Federal District Court in New York

In May 1925, Herman Ruby and Dave Dreyer assigned their copyright interest in the song "Cecilia," to Irving Berlin, Inc. Berlin obtained a copyright in the song as an unpublished work. Ruby assigned his renewal rights for the second 28-year term of copyright protection to ABC Music Corp, a successor in interest to Berlin; in 1967, Bourne Co. acquired the rights to "Cecilia."

Ruby died in 1959. In February 1978, Ruby's widow, Edwyna, served a notice of termination on Bourne with respect to the extended renewal period, under the Copyright Act of 1976, of the copyright in the song; the notice specified May 23, 1981 as the effective date of termination. On May 23, 1978, Ruby granted MPL Communications all rights in "Cecilia" for the extended

renewal period. Federal District Court Judge Sprizzo observed that the transfer to MPL, a new grantee, was invalid because it was executed prior to the effective date of termination.

Edwyna Ruby died on March 21, 1979. Ruby's will provided that all royalties to which she might be entitled were to go to her second husband, Hugh P. Coffey, during his lifetime, and after his death, to Kenneth and Richard Marx. The copyright in "Cecilia," which was to revert back to Ruby on the effective date of termination, passed to the residual beneficiary, Coffey. Coffey died on January 4, 1981, and the copyright in "Cecilia," passed to Coffey's residual beneficiary, Velma May Overton.

On May 23, 1981, the date termination became effective, MPL entered an agreement with Kenneth and Richard Marx whereby MPL acquired their rights in "Cecilia" for the extended renewal term. In July 1982,

Bourne entered an agreement with Overton whereby Bourne acquired her rights in "Cecilia" for the extended renewal term. Judge Sprizzo found that Bourne owned the copyright in "Cecilia" during the extended renewal term, and that the MPL parties' only interest was in the writer's share of royalty payments for the first two terms of copyright protection.

The court stated that upholding a bequest of royalties in the extended renewal term, prior to the effective date of termination, even if such a bequest had been specifically made, might be inconsistent with the Copyright Act, for "it would make little sense to forbid the transfer of renewal rights in the copyright to a person other than the grantee prior to the effective date of termination if the most valuable aspect of those renewal rights (i.e., the royalties attributable to that period) could be validly assigned or bequeathed prior to that date." Both will construction and statutory interpretation supported the

conclusion that Bourne was the owner of the copyright in "Cecilia" for the extended term, declared Judge Sprizzo.

Bourne also argued that it was entitled to recover damages from the MPL parties arising from the violation of Bourne's purported statutory "right of first refusal" to negotiate with Ruby for a new grant. The court rejected Bourne's contention, noting that the Copyright Act did not provide that any agreement negotiated by the terminating party must first be offered on the same terms to the terminated grantee. The statute also did not provide for an exclusive period of negotiation. Furthermore, Bourne had not attempted to negotiate with Ruby. In all, stated Judge Sprizzo, Bourne could not claim that its failure to obtain the renewal right was the result of a conspiracy on the part of the MPL parties to convince Ruby that she had signed a valid agreement, thereby

depriving Bourne of an alleged preferred position under the Copyright Act.

Subsequently, in a separate opinion, Judge Sprizzo denied Bourne's request for reconsideration of the company's claim for damages. Judge Sprizzo agreed that his earlier opinion was incorrect to the extent that it suggested that Bourne did not attempt to contact Ruby concerning the renewal rights in "Cecilia;" one of Bourne's agents testified that he had met with Ruby to discuss the renewal rights. But the error did not require a different conclusion as to the conspiracy claim, stated Judge Sprizzo, particularly since there was no evidence that MPL "played any part in causing Ruby to refuse to deal with Bourne." The unilateral decision by Ruby's agent not to negotiate with Bourne, along with the MPL-Ruby agreement itself, was not sufficient to support the conspiracy alleged by Bourne.

The court concluded by declining to award costs or attorney's fees to Bourne in view of the novelty of the issues involved in the action and the lack of any bad faith on the part of the MPL parties.

Bourne Co. v. MPL Communications, Inc., 675 F.Supp. 859 (S.D.N.Y. 1987); 678 F.Supp. 70 (S.D.N.Y. 1988) [ELR 9:12:6]

Federal courts had jurisdiction in (recently-settled) copyright action brought by Vestron against Home Box Office in dispute involving homevideo rights to "Platoon" and "Hoosiers"

The settlement reached by Vestron, Inc., Hemdale Film Corp. and Home Box Office over the home video rights to the films "Platoon" and "Hoosiers" was reported at

ELR 9:9:20 and 9:5:19. During the course of the parties' dispute, a copyright infringement action was filed by Vestron against Home Box Office. A Federal District Court dismissed the action for lack of jurisdiction. When the decision was appealed on an expedited basis, the Federal Court of Appeals concluded that jurisdiction existed under the Copyright Act, and, in order to expedite the District Court's consideration of Vestron's request for a preliminary injunction, issued an unpublished order remanding the matter.

The Court of Appeals recently issued an opinion providing the analysis for its earlier order. Judge Hug noted that Vestron alleged that it owned the exclusive American videocassette distribution rights to the two films, and that HBO infringed those rights. Vestron had obtained the videocassette rights to the films from their producer, Hemdale Film Corporation. However, Vestron and Hemdale were involved in several pending contract

actions in state court. When Hemdale sold the videocassette rights to the two films to HBO, Vestron responded with a copyright infringement action against HBO.

Judge Hug found that Vestron's action arose under federal copyright law because the company's complaint set forth an infringement claim and sought remedies expressly created by federal copyright law. Vestron alleged its ownership of the exclusive rights to make and distribute videocassettes of "Hoosiers" and "Platoon;" alleged, with specificity, unauthorized acts by HBO of copying and distributing videocassettes of the films; and, most significantly, sought remedies expressly granted by federal copyright law.

The fact that Vestron claimed ownership of the copyrights through a contested contract governed by state law was not fatal to federal jurisdiction, declared the court, nor was jurisdiction affected because HBO admitted the allegedly infringing acts, leaving ownership as

the "sole question" to be determined by the court. Judge Hug stated that since there was no "fatal flaw" on the face of the complaint, the action should not have been dismissed for lack of subject matter jurisdiction.

Vestron, Inc. v. Home Box Office, 839 F.2d 1380 (9th Cir. 1988) [ELR 9:12:7]

California Attorney General issues opinion finding that Youth Authority's proposed use of video recorders to "time-shift" television programming would not constitute copyright infringement nor would use of satellite dish to receive television broadcasts; contrary finding is reached with respect to storebought or rented videocassettes of copyrighted motion pictures

California Attorney General John Van de Kamp has issued an opinion concerning the use of video recording equipment and satellite dishes to present programming to institutionalized wards of the state's Youth Authority.

In response to questions asked by the Director of the Department of Youth Authority, the Attorney General stated that the prior video recording by Authority personnel of regularly broadcast television programs of copyrighted motion pictures and other works for showing at a later time would not constitute copyright infringement, nor would the use of a satellite dish to receive such programs constitute a violation of the Communications Act of 1934, as amended. However, the opinion concluded that the showing of prerecorded videocassettes of copyrighted motion pictures would constitute copyright infringement.

The opinion first states that the showing of videocassettes of copyrighted material to Youth Authority wards

in living unit day rooms was a "public performance" of the recorded material. The Attorney General had determined in 1982 (ELR 3:24:3) that showing videocassettes of copyrighted works to prison inmates by correctional authorities constituted copyright infringement because the works were publicly performed, i.e., shown at a place where "a substantial number of persons outside of a normal circle of a family and its social acquaintances" was gathered. There was little difference between the situation addressed in 1982 and the instant case, declared the opinion. However, in view of the United States Supreme Court's decision in 1984 in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S.417 (ELR 5:9:10), the Attorney General proceeded to reexamine its 1982 conclusion that the showing of videocassettes to incarcerated inmates was not a "fair use" of the copyrighted works contained therein.

Under the statutory four factor fair use analysis, it was found that the use of the copyrighted works in this case might advance important public interests by assisting the education of the Authority's wards; that time shifting enabled Authority personnel, because of scheduling convenience, security purposes, or only then-available reception, to obtain material voluntarily telecast by copyright owners over the public airwaves to individual homes free of charge; and that the fact that an entire work might be taken did not preclude a finding of fair use if there was no reduction in the market for the original work.

Van de Kamp then found that the Youth Authority's limited time-shifted exhibition of copyrighted works was not likely to have a serious adverse impact on the potential markets for the works. Thus, the Authority's proposed use of the works was a fair use and did not amount to copyright infringement.

To the contrary, the showing of copyrighted works from videocassettes that the Authority planned to rent or purchase at a normal price would be considered copyright infringement, stated the opinion. A finding of fair use was precluded because the Authority in this case would not be using a work from a freely distributed medium, and, most significantly, because the showing of videocassettes might harm a market for the copyrighted work. Furthermore, the direct economic relationship between the copyright holders and the Authority, via the purchase or rental of material, meant that harm from an infringing use was not speculative - there exists a two-tiered pricing system whereby institutional users, for a higher price, can obtain cassettes, from an authorized distributor, together with the rights of unrestricted public performance. The Authority's proposed showings of pre-recorded videocassettes, concluded Van de Kamp, therefore would constitute copyright infringement.

The most important factor leading the Attorney General to conclude that the use of a satellite dish to receive regularly broadcast free television programs did not violate section 705 (formerly 605) of the Communications Act was that the section does not apply, inter alia, to receiving or utilizing the contents of any communication "which is transmitted by any station for the use of the general public" The Authority was not planning to "pirate" signals broadcast by a programming service to fee-paying subscribers.

Opinion of John K. Van De Kamp, Attorney General,
State of California, Office of the Attorney General
(No.86-801, Jan. 21, 1988) [ELR 9:12:7]

Licensee's agreement to deliver cartoons for non-commercial closed-circuit military television showing infringed King Features' copyrights, but damage award of \$137,000 is remanded

When King Features Entertainment granted Milton Salzburg a one-year license to sell certain cartoons, including "Beatles," "Barney Googles," "Krazy Kat," "Popeye," and "Flash Gordon," it was agreed that the cartoons would be used by the United States Armed Forces, on military bases in the United States and its territories. The cartoons were to be shown free of charge and not on television or cable.

However, Salzburg had negotiated contracts with the Armed Forces Radio and Television Service to deliver the cartoons at issue - the Service planned to transmit the material by satellite for viewing at military bases via closedcircuit television.

King Features sued Salzburg for copyright infringement, among other claims. The United States also sued Salzburg, on behalf of the Service, alleging payment by mistake, unjust enrichment, violation of the False Claims Act, fraud and conversion, and breach of contract.

A Federal District Court granted summary judgment to the United States on its breach of contract claim, holding that Salzburg did not have the authority to convey to the Service the rights to televise the cartoons outside the contiguous United States. The court granted the United States' motion to dismiss the remaining claims in its action, and entered final judgment against Salzburg.

The District Court also granted King Features' motion for partial summary judgment on its claim for copyright infringement and awarded the company damages of \$137,000-the amount which the Service paid to Salzburg for the cartoons- and granted King Features' motion to dismiss its remaining claims.

Salzburg's cross-claims against King Features for indemnity, breach of contract, and bad faith denial of contract were dismissed.

Salzburg argued that the language in the agreement declaring that the cartoons would be shown free of charge and not on television or cable was understood in the industry to mean that the cartoons could not be shown on commercial broadcast or cable television.

Federal Court of Appeals Judge Leavy stated that the agreement was not reasonably susceptible to Salzburg's interpretation that military, closed-circuit television was an acceptable method to view the cartoons. And the use of the word "territories" did not include worldwide United States military bases, as argued by Salzburg, but rather referred to Guam, the Virgin Islands and American Samoa.

In all, by licensing the cartoons to the Service for worldwide use, Salzburg exceeded the scope of the King Features license.

Salzburg claimed that King Features knew he was going to license the cartoons to the Service, and that the company, by accepting his final payment of about \$80,000 (the balance after a deposit of \$10,000), and delivering the cartoons, acquiesced to Salzburg's interpretation of the agreement and was estopped from challenging his arrangement with the Service.

Judge Leavy found that there was no genuine issue as to whether King Features waived any of its rights, or whether the company was estopped from asserting its interpretation of the scope of the agreement.

With respect to damages, it was found that the District Court did not correctly analyze the extent to which the market value of the cartoons was destroyed or injured by Salzburg's action. The court, stating that there was no

proof that King Features could not have sold its cartoons to the Service after 1983 (thereby reducing its damages), reversed the award of \$137,240, and remanded the issue for a determination of King Features' actual damages, if any, from the copyright infringement.

The District Court's dismissal of Salzburg's cross-claims was not an abuse of discretion, concluded Judge Leavy.

United States of America v. King Features Entertainment, Inc., Case Nos. 87-5747, 87-5944, 84-3253 (9th Cir., April 4, 1988) [ELR 9:12:8]

"Visual style and tone" of advertising agency's television commercials for a local newspaper were protectible under copyright law, rules Federal District Court in Minnesota; agency was entitled to proceed with copyright and trademark infringement claims against creator of allegedly substantially similar eyewear commercials

In 1980, the California advertising agency of Chuck Blore & Don Richman created a series of television commercials for a local newspaper; the commercials featured actress Deborah Shelton. In 1986, a Minnesota agency, 20/20 Advertising, produced four television commercials for its client Duling Optical Corporation; the commercials for Duling, a company specializing in eyewear products, also featured Shelton.

Blore contended that although the text and subject matter of the Duling commercials were different from those

of the newspaper commercials, the commercials were substantially similar with respect to rapid montage-style editing, frequent changes in Shelton's hairstyle, framing, collar position on Shelton's blouse and the use of a striped blouse, jewelry, tone of voice and voice level. Two supervisors of the Duling commercials admitted making unauthorized copies of Shelton's television commercials for the newspaper.

In considering whether the non-textual elements, such as the rapid-edit style and use of close-ups in the Blore commercials were non-copyrightable advertising themes, or were expressions of an idea entitled to copyright protection, Federal District Court Judge MacLaughlin first agreed with 20/20 that Blore could not copyright the use of Deborah Shelton in a commercial.

However, the court found that the similarities between the commercials did involve protectible material. Artistic choices such as "a particular montage style, camera

angle, framing, hairstyle, jewelry, decor, makeup and background [serve to] express the concept behind any given commercial and distinguish its images and sounds from the otherwise infinite universe of commercials which might have been made" Contrary to 20/20's argument, the specific artistic choices inherent in the "visual style and tone" of the Blore commercials were protected by the copyright laws. Whether the idea behind the commercials was that of a celebrity presenting a product, or, as suggested by Judge MacLaughlin, the idea that Shelton was a beautiful actress whatever she happened to be selling, the commercials expressed "the unique perspective of individual creators" which was entitled to protection.

The court distinguished cases involving unprotectible literary elements, emphasizing that the alleged infringement in this case involved "style, not substance, images and tone not plots or characters. These stylistic devices

go to the heart of copyright protection" (citing *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F.Supp. 706 (ELR 9:5:9)).

In turning to the question of substantial similarity, Judge MacLaughlin found that the objective details of the two series of commercials revealed substantial similarity of ideas between the works. And the overall concept and feel of the two series of commercials also were substantially similar, stated the court, for the ordinary reasonable person would not perceive the differences in the commercials cited by 20/20, such as the background color and Shelton's clothing. Summary judgment therefore was not available to 20/20 with respect to Blore's copyright claim.

Blore also was entitled to proceed with a claim that the 20/20 parties violated section 43(a) of the Lanham Act. Judge MacLaughlin rejected 20/20's argument that since newspapers and eyewear were not in competition with

each other, there could be no likelihood of confusion under the Lanham Act. Blore presented evidence that consumer confusion had arisen over the sponsorship of the Duling commercials; the evidence, along with the unique nature of the commercials, was sufficient to raise an issue of material fact with regard to the likelihood of actual confusion between the Blore and Duling commercials.

Blore's state unfair competition claims under the Minnesota Deceptive Trade Practices Act were dismissed.

Chuck Blore & Don Richman, Inc. v. 20/20 Advertising Inc., 674 F.Supp. 671 (D.Minn. 1987) [ELR 9:12:9]

Author of book about New York Yankees' owner George Steinbrenner did not establish conspiracy claim against parties involved in publication of competing book written by Dick Schaap

In the spring of 1982 two books blossomed forth about George Steinbrenner, the principal owner of the New York Yankees. Ed Linn wrote "Steinbrenner's Yankees," published by Holt, Rinehart and Winston, and Dick Schaap wrote "Steinbrenner!," published by G.P. Putnam's Sons. Both authors were represented at the time by literary agent Sterling Lord.

Linn sued Lord, Schaap and Putnam seeking at least \$1 million in compensatory damages and \$2 million in punitive damages arising from an alleged conspiracy to destroy the market for Linn's book. Linn claimed that he had told Lord about a confidential source who would supply information about the Yankees, and that Lord

"divulged the nature" of the confidential source, as well as the nature of the proposed book, to Schaap and Putnam in violation of Lord's fiduciary duty to Linn.

In granting summary judgment to the Lord parties, Judge Kristin Booth Glen found that Linn did not establish the existence of a conspiracy to misappropriate his ideas. It was noted that Linn's confidential source was a well known figure, "known to Schaap in his own right;" that there was no evidence of any wrongdoing by Lord arising from his representation of both Linn and Schaap; and that upon the publication of Linn's book, the misappropriation claim was 'subsumed' under the copyright laws. In view of the dismissal of the predicate tortious acts, Linn's conspiracy claim also was subject to dismissal, concluded the court.

Linn v. Lord, New York Law Journal, p. 12, col.2 (N.Y.Cnty., April 26, 1988) [ELR 9:12:9]

Author may proceed with breach of contract claim involving publishers' refusal to reprint "The Execution of Charles Horman" rules New York trial court, and may seek punitive damages from publishers

A New York trial court has refused to grant summary judgment to Harcourt Brace Jovanovich and the Hearst Corporation in a breach of contract action brought by Thomas Hauser, the author of the book "The Execution of Charles Horman."

In March 1977, Hauser entered into a contract with Harcourt to write a book based on the death of Horman, an American citizen, in the aftermath of a 1973 Chilean military coup. Harcourt agreed that if the book went out of print after two years from the date of original publication, Hauser could demand that Harcourt either reissue

the work or terminate the agreement and revert all rights to him. The hardcover edition of Hauser's book was published in 1978.

Hearst published the first paperback edition of Hauser's book in 1980 under an agreement with Harcourt. The book was republished in paperback, under the title "Missing" in 1982 upon the release of the film "Missing," which was based on the book.

Soon after, three United States government officials who had been stationed in Chile at the time of Horman's death, began a libel action against Hauser, the publishers, and various parties associated with the film. A Federal District Court granted motions for summary judgment on behalf of the author and publishers (ELR 6:8:13; 7:3:12) and the film makers (9:1:10).

In 1983, Hearst canceled a scheduled reprinting of the paperback version of Missing, apparently because of the lawsuit, and the book went out of stock. At the same

time, Harcourt allegedly stopped efforts to sell the hardcover edition of *The Execution of Charles Horman*. Even after the dismissal of the lawsuit, the publishers refused Hauser's requests to reissue the book and by May 1985, the hardcover edition was out of print.

Acting New York Supreme Court Judge Elliott Wilk stated that summary judgment was precluded because factual questions were presented as to whether the publishers, in allowing the book to go out of print, breached the obligation of good faith and fair dealing inherent in contractual relationships, and as to whether Harcourt's failure to revert the rights to Hauser breached its contract with the author. The court rejected the publishers' argument that the Hauser-Harcourt contract and the Harcourt-Hearst contract gave them the right to exploit and reprint Hauser's book, but imposed no enforceable obligation upon them to promote and publish the work.

Judge Wilk found that Hauser was an intended third party beneficiary of the Harcourt-Hearst contract, and therefore possessed enforceable rights with respect to the benefits of Hearst's promised performance under the contract.

Hauser's motion to amend his complaint to seek punitive damages was granted; the claim that the publishers' conduct was outrageous and wanton and interfered with the public's right to buy and read Hauser's book was sufficient on its face and not totally devoid of merit, stated the court.

In late 1987, according to a news report, the publishers agreed to return their publishing rights to Hauser.

Hauser v. Harcourt Brace Jovanovich, New York Law Journal p.15, col.3 (N.Y.Cnty., March 21, 1988) [ELR 9:12:10]

Los Angeles trial court decision granting summary judgment to completion guarantor of a film in dispute over production funds is remanded by appellate court; production company raised issue of fact as to voidability of completion agreement due to corporate guarantor's alleged failure to pay state franchise taxes

In September 1985, White Dragon Productions and Performance Guarantees, Inc. executed a document entitled "Completion and Security Agreement" Performance Guarantees became the completion guarantor of a film being coproduced by White Dragon. The agreement authorized Performance Guarantees to assume control of production if the company "deemed it likely" that the film would not be completed on time.

During filming, Performance Guarantees did obtain control of production, claiming that it appeared likely

that production would not otherwise be completed on time. Performance Guarantees, pursuant to the agreement, then sought to withdraw about \$44,000 in production funds from White Dragon's accounts at Mitsui Manufacturers Bank.

Mitsui filed a complaint of interpleader. A Los Angeles trial court granted Production Guarantees' motion for summary judgment, and awarded the company the production funds at issue.

A California appellate court has reversed the trial court's decision on the ground that White Dragon raised a triable issue of fact as to the voidability of the agreement. The court found, as argued by White Dragon, that Performance Guarantees was subject to state franchise tax requirements, but had not paid state franchise taxes at the time the company entered the agreement. Summary judgment for Performance Guarantees therefore was improper.

The court noted that it had considered and rejected (but did not set forth in its opinion) White Dragon's remaining arguments with respect to Performance Guarantees' motion for summary judgment. And since the agreement was valid until rendered void, the trial court properly denied White Dragon's motion for summary judgment. It was suggested that on remand, White Dragon conduct further discovery, refile its motion, and explicitly request the trial court to render the agreement void pursuant to Revenue and Taxation Code section 23304.

White Dragon Productions, Inc. v. Performance Guarantees, Inc., 196 Cal.App.3d 163, 241 Cal.Rptr. 745 (1987) [ELR 9:12:10]

Theater owner's claims against exhibitor and distributors under Massachusetts law are remanded to state court; Federal Court of Appeals orders dismissal of antitrust claim as moot

Patriot Cinemas, a Massachusetts motion picture theater owner, sued General Cinema and several major film distributors in a Massachusetts state court claiming that the General Cinema parties violated various state laws by conspiring to deny first-run films to one of Patriot's theaters. The General Cinema parties obtained the removal of the case to a Federal District Court. The District Court, in response to a motion by the General Cinema parties, dismissed the action without prejudice for lack of subject matter jurisdiction, and refused to remand certain of Patriot's claims to the state court. Patriot appealed the District Court's decision.

Patriot then filed a second action in the state court. The General Cinema parties sought to stay the action, noting that if Patriot succeeded in its federal appeal, the state court might be confronted by two similar suits. However, the court denied a stay, based largely on Patriot's representation that it would not pursue a separate claim based on state antitrust law regardless of the outcome of its pending federal appeal. The General Cinema parties cited this statement in support of their motion in the Court of Appeals to dismiss the appeal as moot.

Federal Court of Appeals Chief Judge Levin H. Campbell agreed with the General Cinema parties that the applications of the doctrine of judicial estoppel was warranted in view of Patriot's "self-serving, self-contradiction." Patriot benefitted from the increased pace of its state court action-a benefit obtained by the company's representation that it did not intend to proceed on the state antitrust claim "at all," stated Judge

Campbell, and therefore was not entitled to revive the antitrust claim and have it remanded to the state court.

The court concluded that Patriot's appeal of the dismissal of the antitrust count was moot. However, after reviewing the derivative jurisdiction doctrine, as well as a recent amendment of the removal statute, and considerations of fairness relating to the relevant statute of limitations, Judge Campbell vacated the judgment dismissing Patriot's three state law claims, and instructed the District Court to grant the company's motion to remand the claims to the state court.

Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987) [ELR 9:12:11]

Arizona theater owner's claims of market splitting, bid rigging, and circuit-wide deals by national film distributors and regional exhibitors are remanded for trial, but Federal Court of Appeals upholds summary judgment on behalf of distributors and exhibitors as to other allegedly anticompetitive activities connected with motion picture split agreement

As described by Federal Court of Appeals Judge Boochever, during the mid-1970s, several Phoenix film exhibitors met regularly and divided the rights to films on a picture-by-picture basis. Harkins Amusement Enterprises, the owner of five movie theaters in the Phoenix area, was not a split member.

In 1977, Harkins sued six regional exhibitors and seven national film distributors, alleging seven types of conspiracies in restraint of trade under section 1 of the Sherman Act. Harkins claimed that unlawful preferential

treatment by the distributors prevented Harkins from having a fair opportunity to compete with the exhibitors participating in the split.

A Federal District Court in Arizona granted partial summary judgment to the distributors and exhibitors.

Judge Boochever first found that Harkins met its burden of showing an issue of material fact concerning the participation of the distributors in the market split, and remanded for trial the question of whether the distributors' consistent pattern of awarding films to designated exhibitors in the midst of an admittedly anticompetitive market was justified. It was emphasized that the reversal on the claims was limited to the alleged horizontal combination by the exhibitors and the vertical agreement between split members and individual distributors-no evidence of a conspiracy between any distributors was presented by Harkins.

The split agreement alleged by Harkins, if proven, was illegal per se, stated the court, because the agreement disadvantaged Harkins, a competing exhibitor, by inducing the distributors to deny relationships Harkins needed in order to compete.

Also remanded for trial was Harkins' allegation of bidrigging. According to Harkins, the distributors communicated the terms of its bids to split members; the split member exhibitors then could make better offers, submit late bids, or "circumvent the entire bidding process." Stated Judge Boochever, "While an individual distributor need not utilize competitive bidding, it may not employ a rigged system as a means of effectuating an agreement to allocate its films only to a concerted group, organized to exclude a competitor." The evidence presented by Harkins, particularly with respect to the licensing of "Star Wars," raised at least a reasonable inference that Harkins "was victimized by tainted bidding

procedures," and summary judgment therefore was improperly granted on this issue.

The court next remanded Harkins' claim that the distributor allowed split members to engage in national licensing, rather than a film-by-film, theater-by-theater basis in a geographic market. Circuit-wide deals or "master deals" were declared anticompetitive in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). It was found that Harkins presented factual support of circuit-wide deals-at least four witnesses testified that United Artists was involved in the national licensing of the film "A Bridge Too Far" And documents were produced indicating that Columbia Pictures had granted circuit-wide fee adjustment to General Cinema on "Funny Lady," "Shampoo," and "Tommy."

The District Court's grant of partial summary judgment on Harkins' claims of unreasonable clearances,

discriminatory moveovers, illusory advances and/or guarantees, blind bidding, and shared monopoly were affirmed.

Clearances allow an exhibitor a degree of exclusivity within a particular market, and as vertical nonprice restraints, are evaluated under the rule of reason. However, a rule of reason analysis was found unnecessary because Judge Boochever agreed with the distributors that Harkins did not provide any factual support for its claim that the distributors and exhibitors engaged in a system of unreasonable clearances.

A moveover is the privilege granted a licensee to move a picture from one theater to another as a continuation of the run at the licensee's first theater, or shifting a picture to a different screen at a multiplex theater. Distributor discrimination against small, independent exhibitors in granting moveovers is prohibited by the Sherman Act.

But Harkins did not specify a single instance in which the privilege was denied.

With respect to the claim of distributor discrimination in granting credit allowances to larger exhibitors, or not requiring that payments be made at all, the court found that the evidence concerning the alleged illusory advances and/or guarantees was not probative of a scheme to undermine competitive bidding. Even if it were, partial summary judgment still was proper because Harkins did not show any evidence of discrimination-Harkins admitted never asking for the privilege.

Harkins also did not present sufficient evidence to raise a triable issue of fact as to whether blind bidding adversely affected competition in the Phoenix area so as to violate the rule of reason, stated Judge Boochever.

The court concluded by affirming summary judgment on behalf of the distributors and exhibitors on the claim of shared monopoly under section 2 of the Sherman Act,

finding that in this case, involving a small market with numerous sellers, no claim was stated under section 2.

Harkins Amusement Enterprises, Inc. v. General Cinema Corporation, Case Nos. 86-2553, 86-15046, 87-1740 (9th Cir., April 6, 1988) [ELR 9:12:11]

Motion picture exhibitor may conduct further discovery in its action alleging that competing exhibitor and three film distributors violated state's antitrust law, rules California appellate court

"Cutoff cards" are records used by film distributors to provide a history of film rentals in a particular market. When Redwood Theaters, a Modesto, California theater owner, sued Festival Enterprises, a competing film exhibitor, and Paramount Pictures, Warner Bros.

Distributing Corporation, and Orion Pictures Corporation, Redwood moved to compel the production of the distributors' cutoff cards. The trial court, however, entered summary judgment for Festival and the distributor parties on Redwood's complaint seeking treble damages for antitrust violations under the Cartwright Act, and, alternatively, damages for fraud.

A California appellate court has remanded the matter in order to allow Redwood to renew its discovery motion. Judge Newsom stated that the alleged agreements between Festival and Paramount, and between Festival and Warner Bros., if proved, would present a triable issue as to an unreasonable restraint of trade under the Cartwright Act, and that the trial court had deprived Redwood of potentially probative evidence. Judge Newsom cautioned that if the discovery motion did not produce probative evidence, the distributors would be entitled to seek summary judgment on the ground that

there was no triable issue of fact as to the existence of the alleged agreement.

Judge Newsom affirmed the decision granting summary judgment to Orion Pictures. It was noted that Orion came into corporate existence in 1983 as the successor of Filmways, and that during the period covered by the complaint, Orion achieved only a three percent market share. Furthermore, Orion's films were not among the "big money makers" in this period. It would be anomalous, stated Judge Newsom, to hold that Orion, "a new entrant and a relatively marginal participant in the industry," was responsible for imposing barriers to fair competition among exhibitors.

Also affirmed was the ruling granting summary judgment with respect to the fraud cause of action, since the complaint did not allege the essential elements of the tort; Redwood's affidavits themselves tended to rebut

both the existence of misrepresentation and any action in reliance thereon.

In view of the somewhat sparse case law under the Cartwright Act, and the fact that the Act was patterned after federal law, the court's opinion reviewed at length the precedents under the Sherman Act, particularly *United States v. Paramount Pictures*, 334 U.S.131 (1948). The language of *Paramount Pictures*, noted Judge Newsom, suggested that circuit dealing-an exclusive dealing arrangement between a distributor and a theater circuit was a per se violation of the Sherman Act. More recently, as in *Beech Cinema v. Twentieth Century-Fox Film*, 622 F.2d 1106 (ELR 1:23:3), the issue of circuit dealing arose in connection with an alleged conspiracy to cut off an exhibitor from desired first-run films.

In this case, Redwood did not allege a combination among the distributor parties, but rather three separate

agreements between Festival and the distributors. Beech Cinema apparently concluded that a plan to deprive a competitor of needed trade relations, which satisfied the requirements of a conspiracy, constituted a boycott even if a single exhibitor and a single distributor were involved. Judge Newsom found Beech Cinema difficult to justify on its facts, and also noted that Redwood produced no evidence of predatory intent or that the alleged agreements were "dictated" by Festival, concerned with its own position, rather than granted in the exercise of the distributors' independent discretion. The evidence actually suggested that the alleged agreements reflected "the perceived business advantages to the distributors of dealing with large theater circuits," an evidentiary showing that would not sustain a boycott theory of per se liability.

The court next considered the possibility that the alleged agreements were vertical restraints, subject to a

rule of reason analysis to determine their impact on competition. According to the distributors, their average market shares for the five year period at issue, based on ticket sales, were 16 percent for Warner Bros., 15 percent for Paramount and 3 percent for Orion. The market shares did not sufficiently establish the distributors' market power, stated the court, and, in the absence of any allegation or evidence of collusion, could not be aggregated to determine the distributors' collective market power.

However, the distributors' argument that there was no further need to analyze the competitive impact of the alleged exclusive dealing agreements was rejected. It was observed that the unusual competitive conditions of the film exhibition business, "marked by the presence of a unique product in short supply, put an entirely different complexion on the issue of market power." If an exhibitor lacks access to a substantial share of popular first-

run films, the exhibitor may be placed at a "grave competitive disadvantage" against a competitor who has locked-in access to these films through exclusive dealing agreements.

From 1983 through 1985, Warner Bros. and Paramount Pictures distributed about 31 of the 60 films placing among the top 20 box office hits in each year. The court hypothesized that if an exhibitor has access to an inferior share of the major films, the exhibitor may have difficulty in making prompt rental payments or may attract fewer regular customers-any assessment of these hypotheses concerning access to the market would have to await the proof purportedly contained in the cutoff cards sought by Festival, concluded the court.

Redwood Theaters, Inc. v. Festival Enterprises, Inc.,
Case No. A037916 (Ca.Ct.App., April 22, 1988) [ELR
9:12:12]

Music groups obtain permanent injunction barring unauthorized distribution of posters featuring their photographs and logos

As previously reported (ELR 9:7:14), a Federal District Court in California granted a preliminary injunction to Winterland Concessions preventing NEA Enterprises from engaging in the unauthorized distribution of merchandise featuring the logos and photographs of various music groups.

Recently, Judge Thelton E. Henderson entered summary judgment on behalf of Winterland with respect to the company's claims that NEA's distribution of unauthorized posters of the groups violated the groups' right of publicity under section 3344 of the California Civil Code, constituted unfair competition under the

California Business and Professions Code, sections 17200 et seq., and violated section 43(a) of the Lanham Act.

The court found that there was no genuine dispute on the question of whether the groups, including The Grateful Dead, The Beastie Boys, Dokken, The Smiths, Madonna, LL Cool J, Run DMC and the Bangles, had assigned their publicity rights to the corresponding business entities. It was further found that under section 3344 and relevant case law, the groups' failure to permit the commercial use of their photographs prohibited such use; by posing for the publicity photographs, the groups did not infer consent to their commercial use. And the fact that photographers may hold the copyrights in the photographs did not "vitiate" the groups' right of publicity, stated the court, since owning the copyright in a photograph does not confer "the right to exploit the

commercial value of the likeness of the person depicted."

With respect to the Lanham Act claim, Judge Henderson noted that the Act has been applied to protect against unauthorized commercial use of a celebrity's image, creating the deceptive impression that the celebrity has endorsed the product. NEA, by distributing posters of the groups, "potentially" deceived consumers into believing that the posters originated with the groups' authorization and endorsement. The groups did not have to show actual deception or consumer confusion, or intent to deceive, to prevail on this cause of action.

The unauthorized use of the names, logos and likenesses of the music groups on posters also amounted to unfair competition because of the tendency to deceive or confuse consumers, and to dilute goodwill. It was not necessary for the groups to prove that their profit,

reputation, or goodwill actually was damaged by NEA's actions.

The court entered an order permanently restraining the NEA parties from selling merchandise depicting the names and likenesses of the music groups or individual members thereof without permission. A trial will be scheduled on the issue of damages.

Winterland Concessions Co. v. NEA Enterprises, Inc.,
Case No. C87 2405 (N.D.Ca., Mar.25, 1988) [ELR
9:12:13]

Boxing promoter Don King allowed to proceed with action alleging interference with his contract with James "Bonecrusher" Smith; but counterclaims filed by competing promoter are dismissed by New York trial court

The bout began in April 1986 when James "Bonecrusher" Smith granted Don King the exclusive right to promote Smith's boxing career. Tiffany Promotions subsequently sought a declaratory judgment that the contract between Smith and King was invalid and unenforceable. A Nassau County court granted a preliminary injunction barring King from interfering with a scheduled August 23, 1986 boxing match, promoted by Tiffany, between Smith and David Bey; the court did not rule on the validity of the Smith-King contract.

In November 1986, King sued Tiffany and its president, Sam Glass, in a New York trial court, alleging tortious interference with King's contract with Smith. Tiffany, in late November, signed Smith to a bout with Mitch Green, scheduled for December 13, 1986. However, when King asked Smith to participate in a heavyweight title fight set for December 12, 1986, as part of

an event known as the Heavyweight Unification Series, Glass participated in the negotiations on Smith's behalf. The Smith-Green fight was canceled; and Smith knocked out Tim Witherspoon on December 12th.

The courtroom action continued, as Tiffany brought various counterclaims against King. Tiffany's claim for tortious interference with the December 13th Smith-Green fight was dismissed by Judge Greenfield, who noted that Tiffany gave express consent, for "valuable consideration," to the holding of the Smith-Witherspoon fight instead of the Smith-Green fight. The court also found that the cause of action that Smith might have possessed to have his contract with King declared void or voidable was unavailable to Tiffany or Glass, and that Smith had withdrawn the Nassau County action with prejudice.

Judge Greenfield next rejected Tiffany's claim under New York's Donnelly Act. Tiffany did not allege that

King and other parties, including Home Box Office, the telecaster of the Heavyweight Unification Series fights, engaged in the type of concerted action to interfere with Tiffany's right to promote heavyweight boxing bouts which would violate the Act. The court concluded by refusing to dismiss King's cause of action for tortious interference by Glass with the King-Smith exclusive promotion contract.

Don King Productions, Inc. v. Glass, New York Law Journal, p.14, col.3 (N.Y.Cnty., April 29, 1988) [ELR 9:12:14]

Northeastern Baseball obtains specific performance of contract to purchase Triple-A baseball franchise

In September 1986, Triple-A Baseball Club, a Maine limited partnership, agreed to sell its franchise to Northeastern Baseball, Inc. for \$2.4 million. Northeastern Baseball agreed to sell its Double-A franchise, which the company had planned to operate in Scranton, Pennsylvania, to the partnership for \$400,000. The contract stated, in part, that "In the event that the Eastern League of Professional Baseball Clubs shall refuse to approve the sale of the Double-A Baseball Franchise to Triple-A, then this Agreement shall continue in full force and effect with the following modifications: ... " The modifications set the purchase price of the Triple-A franchise at \$2 million.

The Eastern League refused to approve the sale, and stated that it would not give up its territorial claim to the Scranton area unless Northeastern Baseball transferred its DoubleA franchise to the League-the transfer was made on September 10th.

On the date scheduled for the closing of the contract, Triple-A refused to accept \$1.9 million from Northeastern (the \$2 million modified price, less a previously paid \$100,000 deposit). Triple-A then sought a declaratory judgment holding that the contract was terminated "because of the failure of certain required conditions to occur ... "

A Federal District Court, in interpreting the terms of the contract, admitted parol and documentary evidence bearing on the intent of Jordan Kobritz, the general partner of the Triple-A limited partnership, and John McGee, one of the owners of the Double-A franchise. The evidence was admitted because the court found that the parties attached different meanings to the term in the contract "refuse to approve the sale." As described by Federal Court of Appeals Judge Bownes, the District Court found that "an implied-in-fact condition precedent of the September 3 agreement was that the Eastern

League would either approve or refuse on the merits to approve the transfer of the Double-A franchise to the Limited Partnership" (emphasis added by Judge Bownes). The District Court then held that because the implied-in-fact condition precedent did not occur, the agreement terminated by its own terms and Triple-A had to return the \$100,000 deposit.

Judge Bownes, stating that the District Court's opinion "violated the basic principles of contract law," found that the words "refuse to approve the sale" were "susceptible of one meaning; they mean what they say." By finding that the refusal had to be "on the merits" the District Court changed the plain language of the contract, possible because the court was influenced by evidence which should have been excluded. Judge Bownes noted that the agreement contained various contingencies and conditions precedent, and concluded that the omission of either from the paragraph at issue was intentional.

A side agreement executed by the parties also refuted Triple-A's claim that the contract essentially was a "swap" of franchises. It was observed that Kobritz wrote the agreement, and explicitly recognized that Eastern League approval might not be obtained for the transfer of the Double-A franchise, but that this would not terminate Northeastern Baseball's purchase of the Triple-A franchise.

The court next found that specific performance was warranted, citing, in part, the fact that the Triple-A franchise had no readily ascertainable market value; could not easily be obtained from other sources; and was of special interest to Northeastern Baseball. The fact that Northeastern Baseball had a Double-A franchise was not relevant, given the significant differences between Triple-A and Double-A franchises. And, contrary to the District Court, Judge Bownes found that McGee did use

his "best efforts" (as required under a side agreement) to obtain Eastern League approval of the transfer.

The matter was remanded for the entry of a specific performance decree ordering Triple-A Baseball, upon the payment of \$2 million, to convey all of its right, title and ownership in its baseball franchise in the International League to Northeastern Baseball. Pursuant to the side agreement of the parties, Northeastern was directed to make its first of ten annual payments of \$50,000 to Kobritz for consulting services.

Triple-A Baseball Club Associates v. Northeastern Baseball, Inc., 832 F.2d 214 (1st Cir. 1987) [ELR 9:12:14]

Producer of cable television show that featured appearance by "Mayflower Madam" Sydney Barrows wins dismissal of libel suit filed by Barrows' former boss

As previously reported (ELR 9:10:7), the publishers of Sydney Barrows' purportedly autobiographical account of her experiences as the "madam" of a call girl enterprise obtained the dismissal of a libel action brought by an individual named Londers. Londers also sued Lifetime, the operator of a cable television station and the producer of the "Dr. Ruth Westheimer Show." Barrows appeared on the show on November 27, 1986 and allegedly stated that within about two weeks after she encountered a "new boss," Barrows found out "that she was participating in a kickback scheme in which she needed me, my help, to continue doing. And I refused to

give it and so she fired me." Londers claimed that she was the "new boss" to whom Barrows referred.

New York trial court Judge Santaella found that in view of his decision in the companion motion filed by the publishers, a decision which discovered "glaring" defects in the "of and concerning" element of Londers' claim, Lifetime was entitled to an order dismissing the complaint for failure to state a cause of action. The defamatory words relied upon by Londers did not establish an actionable claim because it could not be said that a person knowing Londers would have no difficulty in linking the "new boss" to her.

Londers v. Barrows, New York Law Journal, p.16, col.1 (N.Y.Cnty., April 29, 1988) [ELR 9:12:15]

Sports writer obtains reversal of decision granting summary judgment to The Sporting News on writer's claims of age discrimination, defamation, and injurious falsehood

A Federal Court of Appeals in Michigan has remanded for further consideration an action brought by sports writer Joseph F. Falls arising from a decision by The Sporting News to cease publishing a column which Falls contributed to the weekly newspaper from 1963 until June 1985.

A Federal District Court had granted summary judgment to the newspaper parties on Falls' claim of age discrimination, concluding that Falls was not an employee of The Sporting News for purposes of Michigan's Civil Rights Act.

Federal Court of Appeals Judge Alan E. Norris stated that it was not clear what test the District Court applied

in evaluating the relationship between the parties. The District Court may have relied upon the common law "control" test, rather than the "economic reality" test developed by the Michigan courts. The economic reality test requires viewing an employment situation as a whole, and considering factors such as control of the worker's duties, payment of wages, and whether the duties performed by Falls were an integral part of the newspaper's business and contributed to the accomplishment of a common goal.

Furthermore, conflicting evidence was presented on some of the factors relied upon by the court, such as whether Falls received compensation only for published articles, whether he received any benefits from the newspaper and whether the newspaper exercised any control over Falls' work other than the decision to publish and edit the columns he submitted. Judge Norris also was "uneasy" that summary judgment was rendered

while discovery was still pending. In all, given the uncertainty surrounding the method used to evaluate the parties' relationship, the conflict in summary judgment evidence, and the status of discovery, summary judgment was not warranted on Falls' age discrimination claim, ruled the court.

Summary judgment also was improperly granted on Falls' defamation and injurious falsehood claims, concluded the court.

Falls v. Sporting News Publishing Company, 834 F.2d 611 (6th Cir. 1987) [ELR 9:12:15]

Critical review of book about General Custer was not defamatory, rules Federal District Court in Connecticut

William Gladstone's review of the book "Custer in Photographs" written by Mark Katz, criticized the book's alleged factual inaccuracies and discounted its value as a resource for scholars. The review mentioned, in part, purported mistakes in a "Custer Chronology;" a lack of analysis of the photographs; the failure to list the Custer photographers; and the questionable dating of some photographs. Gladstone concluded that Katz's work in assembling 155 photographs of Custer was "impressive" but that the author's captions and documentation provided "virtually no analysis or text of the photographs themselves. The scholar cannot use the book with ease for there is no index, footnotes or bibliography... [Gladstone] found too many errors in what has been presented and too many questions unanswered."

Katz sued Gladstone in a Federal District Court in Connecticut, alleging that the review, which was widely

published in the United States, was false and defamatory. According to Katz, the review contained the innuendo that Katz was not qualified as a historian of the works of General Custer.

The court, applying the law of Katz's domicile - Pennsylvania - granted summary judgment to Gladstone, finding that nothing in his review was capable of defamatory meaning. Judge Cabranes noted that Gladstone's "tame and completely impersonal" criticism was directed toward the book, not Katz, and that a jury could not reasonably conclude that the review contained the suggested innuendo. Judge Cabranes emphasized that the primary basis for the court's decision was that "reviews of this sort-critical, but impersonal - addressed to the character of the work rather than the character of the author - are not defamatory as a matter of law. To hold otherwise would deprive the public of an invaluable resource and the responsible critic of his very voice."

The court went on to comment that even if the review were capable of defamatory meaning, truth would be a complete defense to Katz's action. Katz's general assertion that there were differences of opinion as to the alleged factual inaccuracies in the book was not sufficient to defeat a motion for summary judgment, nor was a dispute regarding Gladstone's alleged abuse of privilege material where the published review was in no sense defamatory.

Katz v. Gladstone, 673 F.Supp. 76 (D.Conn. 1987)
[ELR 9:12:15]

Copyright Royalty Tribunal's determination that copyright owner was not a "performing rights society" with respect to allocating 1984 jukebox royalty fund is upheld by Federal Court of Appeals

The Copyright Royalty Tribunal correctly determined that the Asociacion de Compositores y Editores de Musica Latinoamericana was not a performing rights society for purposes of distributing the juke box royalty fees collected in 1984, a Federal Court of Appeals has ruled. As a copyright owner, the association was entitled to 0.06 percent of the 1984 fund.

In a prior proceeding, the Tribunal had found that the Asociacion was not a performing rights society because it was not an association or corporation, as used in the statutory definition of performing rights society; had neither licensed any single users nor received any royalties; and did not function in the same manner as ASCAP, BMI, and SESAC.

The Asociacion therefore was on notice, stated the court, of the standards the Tribunal used to determine an organization's status as a performing rights society. And

the Tribunal did not err in applying the standards to the Asociacion in the 1984 proceeding-the Tribunal found that the Asociacion had no system for membership and affiliation and was only an assumed name for LAMCO, a music publishing company. The Asociacion again failed to show that it had actually licensed performing rights to anyone during 1984 and still lacked, in its operation, the essential features of the three societies identified in the statute. In all, there was ample evidence to support the Tribunal's award of 0.06 percent of the 1984 jukebox royalty fund to the Asociacion, rather than the 10 percent of the fund sought by the organization.

Asociacion de Compositores y Editores de Musica Latinoamericana v. Copyright Royalty Tribunal, 835 F.2d 446; 809 F.2d 926 (D.C.Cir. 1987) [ELR 9:12:16]

Advertising agency is not liable to New York Times for cost of client's advertisement

Relying primarily on general principles of agency, a New York trial court has found that Glynn-Palmer Associates, Inc. is not liable to the New York Times for about \$11,500, the net cost of an advertisement the agency placed on behalf of its client Worldwide S.O.S. The court noted that the newspaper was aware that the advertisement in question was not for the agency, since the name of the client was disclosed on the insertion order and appeared on the Times bill (the Times did not sue Worldwide S.O.S.). When the identity of a principal is disclosed, stated Judge Friedman, there is a presumption that credit is extended only to the principal and not to the agent; the Times did not meet its burden of showing by clear and explicit evidence that the agency was bound.

It also was noted that the documents involved in the transaction did not state that the agency was liable, or that the newspaper would rely on the agency's credit; that payment by the agency to the newspaper for an advertisement on one prior occasion was not sufficient proof that the agency agreed to use its credit for advertisements; and that there was no proof that under industry custom and usage, advertising agencies implicitly agree to be liable for the cost of advertisements placed for their clients. And the 15 percent agency discount from the newspaper's published advertising rates did not make the agency liable "under any known principal of agency law," stated Judge Friedman.

When the agency completed the newspaper's "Application for Advertising Agency Recognition" form, the top amount of credit sought was \$2,000. The Times accepted advertising from Glynn-Palmer and billed over \$12,000; the credit line was inadequate under the

circumstances and the Times therefore must not have relied solely on the agency's credit, concluded the court in dismissing the complaint.

The New York Times Co. v. Glynn-Palmer Associates, Inc., New York Law Journal, p.7, col. 1 (N.Y.Cnty., April 1, 1988) [ELR 9:12:16]

Single franchise policy of City of Sacramento violated free speech rights of Pacific West Cable Company, declares Federal District Court; company was entitled to injunctive relief as to request for permission to build and operate cable system

When the City and County of Sacramento (referred to herein as the city) refused to grant a cable television franchise to Pacific West Cable Company, the company

brought an action Alleging, in part, the violation of the First and Fourteenth Amendments and sections 1 and 2 of the Sherman Act.

A Federal Court of Appeals upheld a District Court ruling denying Pacific West's motion for a preliminary injunction that would have allowed the company to lay its conduit along with the cables being laid by the franchisee, and a second preliminary injunction that would have prevented the city from denying the company the opportunity to build and own a cable television system (ELR 8:8:17). The company's antitrust claims were dismissed for failure to state a claim upon which relief might be granted.

After a trial, the jury responded to special verdicts by finding that Pacific West had the technical and financial capabilities to construct and operate a cable television system in the Sacramento area; that the city did not leave open "ample alternative channels of

communication" for Pacific West or similarly-situated cable companies; and that the capacity of the public rights of way and utility easements in Sacramento were not limited to any significant degree there was sufficient room for all cable companies who wanted to use them.

The jury also rejected the city's contention that the construction and operation of a cable television system would cause significant disruption in the use of public or private property, or significant safety hazards. It was further found that cable television was not a natural monopoly, and that the city had used this justification as a "sham" for granting a single cable television franchise and requiring cash payments and various services by the successful franchisee, as well as to obtain increased campaign contributions for local elected officials.

In responding to other special verdicts, the jury agreed with the city that the public would benefit from equal and uniform cable television service throughout the

Sacramento community, and that the city's franchising procedure encouraged such uniformity; and that the provision of public access channel and other facilities and resources also benefitted the public.

The jury was unable to agree on whether the predominant purpose of Sacramento's franchising process was to suppress speech, and also did not agree on whether the city denied Pacific West permission to construct and operate a cable television system because the city opposed the company's views. Also unanswered were special verdicts on whether the franchising process was applied evenhandedly, regardless of viewpoint, and whether the city's purpose was to advance the expression of one viewpoint and discourage the expression of another.

After the jury returned its special verdicts, the city enacted ordinances which opened up the cable market to competition; certain requirements were imposed on cable system applicants, but the single franchise policy

was abandoned. Nevertheless, the instant action was not moot, stated Judge Milton L. Schwartz particularly because there was a possibility, in view of a pending action challenging the new ordinance, that any licenses issued under the ordinance ultimately would be invalidated.

Judge Schwartz noted that there was no showing that a single franchise policy was the only, or even the most effective, way to assure that only technically or financially sound cable television systems were built. Furthermore, Pacific West had the requisite capabilities to construct and operate a system. The restriction on speech caused by the city's policy thus was significantly greater than necessary to promote the asserted interest in having a technically wellqualified cable system operator.

The city's interest in providing equal and uniform service also was not sufficiently substantial to justify a

governmentcreated artificial monopoly over cable television, since it was not clear that such a monopoly was essential to achieving such uniform service. Furthermore, in the absence of a single franchise policy, competition among cable television systems might be feasible-the city's policy thus served to reduce the diversity of expression available to cable television subscribers.

Judge Schwartz concluded that Sacramento's single franchise policy violated Pacific West's free speech rights, and directed the city to issue to Pacific West the required licenses to construct and operate a cable television system or systems. The jury had found that the company was not entitled to money damages, and the court agreed with this special verdict.

Pacific West Cable Company v. City of Sacramento, California, 672 F.Supp. 1322 (E.D.Ca. 1987) [ELR 9:12:16]

Briefly Noted:

Wrongful Death/Harness Racing Driver.

A New York trial court has granted summary judgment to the State of New York in an action brought by Laura Dunckley seeking to recover damages for the wrongful death of her husband, harness racing driver David J. Dunckley. Dunckley allegedly was involved in a mishap while participating in an event at Roosevelt Raceway on May 16, 1986. Laura Dunckley claimed, in part, that the New York State Racing and Wagering Board had failed to implement regulations governing the wearing of protective safety helmets. Court of Claims Judge Weisberg stated that the relevant regulations only empowered the Board to set guidelines for the use of helmets at such

time when proper standards might be developed-the regulations did not set forth any specific standard of care which could have been breached by the Board parties. Furthermore, the regulations and attendant directives were an exercise of the state's sovereign powers, and immunity attached to the exercise of such powers. Even if qualified immunity were to be applied by the court, Dunckley presented no evidence to establish that the Board's decision to defer mandating the use of a particular helmet lacked a rational basis for many drivers and trainers had objected, on safety grounds, to the use of the helmet.

Dunckley v. State of New York, New York Law Journal, p. 13, col.4 (N.Y.Ct.Clms., Sept. 25, 1987) [ELR 9:12:17]

Political Commercial.

A television commercial for Peter Shapiro, a candidate in the 1985 New Jersey gubernatorial campaign, began with a four-second segment taken from a commercial for Shapiro's opponent, Governor Thomas Kean. The segment contained narration by announcer James Dukas. A New York trial court has granted summary judgment to the producer of the Shapiro commercial. The court, assuming that Dukas retained some interest in the narration portion of the commercial, stated that any such interest was far outweighed by "the public's right to free and unfettered political debate" The producers of the commercial had a legitimate political purpose and did not intend to interfere with Dukas' business relationships.

Dukas v. D. H. Sawyer & Associates, 520 N.Y.S.2d 306, 14 Med.L.Rptr. 1794 (1987) [ELR 9:12:18]

Outdoor Advertising.

The California Supreme Court has ruled that United Outdoor Advertising's proposal to place five illuminated metal billboards in an area near the town of Baker did not meet the requirements of the state's Outdoor Advertising Act. The Act permits the placement of billboards along certain types of highways in areas "zoned under authority of state law primarily to permit industrial or commercial activities." United had obtained site approval from San Bernardino County for the advertising structures, but the state Business, Transportation and Housing Agency denied the company's application for billboard permits because it determined that site

approval was not equivalent to zoning under authority of state law.

A trial court granted a writ of mandate to compel the Agency to issue the permits; the trial court's ruling was upheld on appeal. However, California Supreme Court Justice Mosk, in reversing the judgment of the Court of Appeal with directions to reverse the trial court's judgment granting the writ of mandate, noted that Baker, "an oasis of humanity in the vast expanses of the Mojave Desert, was labeled a "Desert Special Service Center" commercial or industrial activities were not the "primary" uses of the zone. Furthermore, most of the county's desert land was "not the legislatively contemplated setting for outdoor advertising," and site approval did not amount to a comprehensive zoning ordinance enacted by the governing body of the county.

United Outdoor Advertising Co., Inc. v. S.E. Lancaster,
Case No.BCV 1341 (Ca., Jan.7, 1988) [ELR 9:12:18]

Photography Release.

An individual's failure to read a photographer's consent form prior to signing the form was insufficient as a matter of law to vitiate the consent, a New York trial court has ruled. The court granted a motion by Fun World to dismiss a complaint seeking damages and an injunction under sections 50/51 of the New York Civil Rights Law for the unauthorized use of photographs in a product catalogue and on products distributed by Fun World. The argument that the gratuitous release could be revoked at any time was rejected by the court, as was the assertion that a release of indefinite duration was void.

Francica v. Fun World, New York Law Journal, p. 14, col.6 (Nassau Cnty., Feb. 18, 1988) [ELR 9:12:18]

Contracts/Designer Cosmetics.

Describing the dispute before the court as "a matter of dollars and scents," New York Supreme Court Judge Greenfield granted Liz Claiborne, Inc. a preliminary injunction requiring Avon Products to continue to supply the sportswear maker with cosmetic products, pending the dissolution of the parties' business relationship. In December 1985, a Claiborne subsidiary and an Avon subsidiary entered into a joint venture agreement, a license agreement, and a services agreement. Avon subsequently acquired the Giorgia and Catherine Deneuve fragrance lines, and purchased Parfums Stern, Inc., the manufacturer and distributor of designer cosmetics for

Oscar de la Renta, Perry Ellis, and Valentino. Claiborne claimed that the acquisitions, and Avon's plans to market the fragrances through retail stores, violated Avon's covenant not to compete with the business of the joint venture. The parties discussed the dissolution of the joint venture, but could not agree on a buyout figure. In February 1988, Avon indicated that it would not continue to service the orders placed by the joint venture. Judge Greenfield found that although Claiborne may have claimed a breach by Avon of the covenant not to compete, no notice of termination was given, and the joint venture, including its merchandise pricing provisions, continued to exist. Money damages were found inadequate to compensate for the likely harm to Liz Claiborne's reputation which would result from a failure to supply stores with cosmetic and fragrance products for the 1988 Fall/Christmas season. The court therefore ordered Avon to fulfill Claiborne's purchase orders

calling for product delivery up to and including the end of August 1988; however, no "pressing necessity" was found to compel Avon to fill orders calling for November and December deliveries.

Liz Claiborne, Inc. v. Avon Products, Inc., New York Law Journal, p. 14, col. 5 (N.Y. Cnty., March 24, 1988) [ELR 9:12:18]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Robi v. Five Platters, Inc., 838 F.2d 318 (9:10:8); United States v. Kantor, 677 F.Supp. 1421 (9:10:11); Chiasson v. New York City Department of Consumer Affairs, 524 N.Y.S.2d 649 (9:10:12).

The United States Supreme Court has declined to review the decision in *Worth v. Selchow & Righter* (9:6:11) in which a Federal Court of Appeals rejected a copyright infringement claim brought against the distributor of the game "Trivial Pursuit."

Former KABC-TV reporter Wayne Satz has settled a \$5 million wrongful termination action against the station. In February 1988, a Federal District Court judge ruled that the dispute concerning Satz's 1987 departure from KABC should be heard by an arbitrator (9: 10: 18). The terms of the out-of-court settlement were not disclosed.

[ELR 9:12:18]

WASHINGTON MONITOR

United States Department of Justice will not retroactively prosecute pre-June 1985 product splitting, except for "particularly egregious" violations

The United States Department of Justice has announced that it will not prosecute parties who, prior to June 1985, discontinued product splitting activities. In February 1985, three months prior to the cutoff date, a Federal Court of Appeals in Wisconsin (ELR 7:1: 11; 7:7:20) upheld a Federal District Court order enjoining Milwaukee area film exhibitors from engaging in split agreements throughout the United States; the District Court found that the product splitting agreement at issue was a per se violation of section 1 of the Sherman Act.

The Justice Department has warned, however, that particularly egregious" instances of pre-June 1985 product splitting may be subject to prosecution. [May 1988] [ELR 9:12:19]

United States Supreme Court lets stand \$3 million jury verdict against CBS in libel action brought by tobacco company

The United States Supreme Court has let stand a Federal Court of Appeals decision (ELR 9:8:16) upholding a recordsetting jury verdict against CBS, Inc. and WBBM-TV newscaster Walter Jacobson in a libel action brought by Brown & Williamson Tobacco Corporation. The Court of Appeals had reduced the jury's compensatory damage award of \$3 million to \$1 million, but found that an award of \$2.05 million in punitive damages was not excessive.

Brown & Williamson's action claimed that a newscast on WBBM, a CBS-owned station in Chicago, falsely accused the company of adopting a marketing strategy

designed to attract young people to smoking. Federal Court of Appeals Judge Bauer determined that clear and convincing evidence required a finding that Jacobson acted with actual malice in making false statements about the company, and that such statements were not protected by the First Amendment. [May 1988] [ELR 9:12:19]

Federal Communications Commission fines two California dial-a-porn companies \$600,000 each for failure to restrict access

The Federal Communications Commission has fined two Northern California companies, Intercambio Inc. and Audio Enterprises Inc. of Mill Valley, \$600,000 each for transmitting obscene material across state lines and for failing to restrict access by minors to the

companies' dial-a-porn services. The fines were based on the amount of money the companies made during the Commission's monitoring process.

The companies apparently claimed that they did not have the capacity to provide access screening, and denied that the messages were obscene. Intercambio also argued that it never intended to engage in the interstate transmission of its messages or to provide its service to minors. [May 1988] [ELR 9:12:19]

Congress overrides Presidential veto and enacts law prohibiting universities from discriminating against athletic programs for women

A civil rights law, enacted upon the overriding by Congress of President Reagan's veto, provides, in part, that any university that receives federal funds for any

program must not discriminate against women's athletics. The law essentially replaces Title IX of the 1972 Education Amendments. However, the United States Supreme Court had held that Title IX applied only to specific programs receiving federal funds, not to the entire university. [May 1988]
[ELR 9:12:19]

IN THE NEWS

Los Angeles court orders Buena Vista Television to continue delivering episodes of "The Wonderful World of Disney" television series to Ohio educational stations

A Los Angeles trial court has ruled that Buena Vista Television must continue to deliver 178 episodes of

"The Wonderful World of Disney" to Northeastern Educational Television of Ohio, the owner of two educational television stations. The broadcaster had claimed that Buena Vista breached a syndication agreement by refusing to deliver the series to the station after Northeastern complained that Buena Vista was selling overlapping rights to an independent television station in Cleveland. Northeastern also sought damages for the "wrongful withholding" of a television series, but, according to news reports, a jury trial on this issue has not been scheduled. [May 1988] [ELR 9:12:20]

Los Angeles trial court dismisses author Joe McGinniss from action seeking to impound \$325,000 "Fatal Vision" settlement payment to Jeffrey MacDonald

A Los Angeles trial court judge has dismissed Joe McGinniss as a defendant in an action involving the disposition of the author's \$325,000 settlement payment to Jeffrey MacDonald.

MacDonald, who was convicted of the 1970 killings of his wife and two young daughters, had sued McGinniss in federal court, disputing the author's account, in the book "Fatal Vision," of the killings and subsequent trials. After a mistrial in the summer of 1987, McGinniss, without admitting any liability in connection with MacDonald's claims, agreed to pay MacDonald \$325,000 to settle his lawsuit (ELR 9:7:19).

Mildred and Alfred Kassab, the mother and stepfather of MacDonald's slain wife, brought an action seeking to impound the settlement payment. But the action will not proceed against McGinniss, ruled Superior Court Judge Miriam Vogel. [May 1988] [ELR 9:12:20]

**Federal District Court jury rejects songwriter's
copyright infringement claim against Mick Jagger**

Mick Jagger's song "Just Another Night" did not infringe a copyrighted song of the same name written by Patrick Alley, a Federal District Court jury in New York has concluded. [May 1988] [ELR 9:12:20]

**Arbitrator orders Lorimar Telepictures to pay
\$2,000 to the Writers Guild in credit dispute involv-
ing "Max Headroom"**

An arbitrator has ordered Lorimar Telepictures to pay \$2,000 to the Writers Guild in a dispute over the screen credits on "Max Headroom."

According to news reports, arbitrator Thomas Christopher found that the Guild was entitled to seek damages for an alleged contract violation that "adversely affect[ed] its institutional role," and that under the Guild contract, an arbitrator has the "jurisdiction and power to award damages." The writers apparently waived damages in connection with the alleged violation of the relevant credit provisions, and were not parties to the arbitration. Lorimar, and other employers, contend that any damages awarded to unions, rather than to union members, arising from contract violations, constitute improper punitive damages. [May 1988] [ELR 9:12:20]

National Basketball Association and National Basketball Players Association agree on new six-year contract

The National Basketball Association and the National Basketball Players Association have agreed on a new six-year contract.

The contract provides, in part, that the draft of college players will be cut from seven rounds to three rounds in June 1988, and to two rounds thereafter; undrafted players will be free to negotiate with any team. The salary cap will continue, but minimum annual increases have been scheduled; the increases, together with projected increases in team revenues, will likely bring the average players's salary to about \$1 million by 1993, predicted NBA Commissioner David Stern (the current average is \$520,000).

The teams' right of first refusal has been modified by the contract. Players who have been in the league for seven years as of the end of the current season will not be subject to the right of first refusal; the time period will be reduced each year, reaching three years in the

1993-1994 season. To retain the right of first refusal, a player's team must offer a one-year contract for at least 125 percent of his previous salary. And the right of first refusal will apply only to players who are offered \$250,000 or more by their old teams.

According to news reports, the NBA and the Players Association also agreed in principle to jointly provide a pension for pre-1965 players who are not covered by the existing NBA player pension plan.

The Players Association has agreed to discontinue, upon ratification of the contract, an antitrust action against the NBA. [May 1988] [ELR 9:12:20]

Chicago City Council lifts ban on night baseball game at Wrigley Field

The Chicago City Council has voted to end the ban on night baseball games at Wrigley Field. The ordinance, which is effective until 2002, will allow eight night games in the 1988 season and 18 night games in each of the following years. Prior to the City Council's action, the major league team owners had voted to hold the 1990 All-Star game in Chicago if the Cubs agreed to install lights. [May 1988] [ELR 9:12:21]

New York State Crime Victims Board decides Bernhard Goetz may keep earnings from sale of his story

The New York State Crime Victims Board has decided that Bernhard H. Goetz will be allowed to keep any earnings from the sale of his story. Under the state's "Son of Sam" law, any profits made by convicts who sell the stories of their crimes are held in escrow by the

Board on behalf of the victims of the crimes. The Board stated that the law did not apply to Goetz because a jury determined that the four young men he shot were not crime victims. Goetz was acquitted of assault, attempted murder, reckless endangerment and of all but one weapons charge. [May 1988] [ELR 9:12:21]

Actors end strike against radio and television advertisers

An actors' strike against television and radio advertisers has been settled. The boards of the Screen Actors Guild and the American Federation of Television & Radio Artists voted to recommend that the unions' members ratify a new commercials contract.

According to news reports, the contract, in part, will require advertisers to pay additional fees to performers

when broadcast television commercials are used on cable television. The unions also obtained increases in television session fees, in residuals from nonnetwork nonnational commercials, in all of AFTRA's radio rates, in residuals from 10-15 second commercials, and in pension and health plans. Stronger affirmative-action and safety guidelines, and new "ethical guidelines" for casting directors are included in the new contract. And the advertisers did not win their demand for a 50 percent cut in the pay of commercial extras and of performers who appear in Spanish-language advertisements.

The advertisers succeeded in eliminating the unions' cost-of-living clauses. [May 1988] [ELR 9:12:21]

DEPARTMENTS

In the Law Reviews:

Comm/Ent, Hastings Journal of Communications and Entertainment Law, has published a symposium concerning the FCC Under Chairman Fowler as its Volume 10, Number 2 with the following articles:

Introduction by Dennis Patrick, 10 Comm/Ent 405 (1988)

The Federal Communications Commission 1981-1987: What the Chairman Said: Speeches by Mark S. Fowler, 10 Comm/Ent 409 (1988)

The FCC Under Mark Fowler: A Mixed Bag by Henry Geller, 10 Comm/Ent 521 (1988)

Policy-Making at the Fowler FCC: How Speeches Figured In by Daniel Brenner, 10 Comm/Ent 539 (1988)

A Critique of the Fowler FCC's 1984-85 Multiple Ownership Rule by Herbert H. Howard, 10 Comm/Ent 555 (1988)

Consistency Over Time: The FCC's Indecency Rerun by L.A. Powe, Jr., 10 Comm/Ent 571 (1988)

Posadas de Puerto Rico v. Tourism Company of Puerto Rico: The End of the Beginning by P. Cameron DeVore, 10 Comm/Ent 579 (1988)

The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification by Bennett J. Fidlows, 10 Comm/Ent 591 (1988)

Stone Got Caught Between a Rock and a Hard Place: Grand Juries' Power to Subpoena Outtakes That Reveal

Confidential News Sources by Marty Kassman, 10 Comm/Ent 623 (1988)

Communications and the Law, Volume 10, Number 2, has been published by Meckler Corporation, II Ferry Lane West, Westport, CT 06880, with the following articles:

Newspaper JOAs and the Logic of Predation by John C. Busterna, 10 Communications and the Law 3 (1988)

Constitution Provides Limited Libel Protection to Broadcast Commentators by Don Sneed, Whitney S. Mandel and Harry W. Stonecipher, 10 Communications and the Law 19 (1988)

Unconscionability in Public Disclosure Privacy Cases by Deckle Mclean, 10 Communications and the Law 31 (1988)

Allocating Spectrum by Market Forces: The FCC Ultra Vires?, 37 Catholic University Law Review 149 (1987)

Proof of Economic Power in a Sherman Act Tying Arrangement Case: Should Economic Power Be Presumed When the Tying Product Is Patented or Copyrighted? by J. Dianne Brinson, 48 Louisiana Law Review 29 (1987)

Fellows v. National Enquirer: Limiting the False Light Invasion of Privacy Tort by Jeanne E. Courtney, 19 Pacific Law Journal 355 (1988)

Practical Reason and the First Amendment by Daniel A. Farber and Philip P. Frickey, 34 UCLA Law Review 1615 (1987)

Constitutional Libel Law: The Role of Content by Marc A. Franklin, 34 UCLA Law Review 1657 (1987)

Libel Proof Plaintiffs-Rabble Without a Cause, 67 Boston University Law Review 993 (1987)

Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation by Rodney A. Smolla, 75 The Georgetown Law Journal 1519 (1987)

California's Unitary Tax Reform Law, 11 Suffolk Transnational Law Journal 105 (1987)

The American Bar Foundation Research Journal has published a Symposium on the Attorney General's Commission on Pornography as its Fall 1987 volume with the following articles:

The Attorney General's Commission and the New Politics of Pornography by Donald Downs, 1987 American Bar Foundation Research Journal 641 (1987)

The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report by Robin West, 1987 American Bar Foundation Research Journal 681 (1987)

The Attorney General's Commission on Pornography: The Gaps Between "Findings" and Facts by Daniel Linz, Steven D. Penrod, and Edward Donnerstein, 1987 American Bar Foundation Research Journal 713 (1987)

Causation Theory and the Causes of Sexual Violence by Frederick Schauer, 1987 American Bar Foundation Research Journal 737 (1987)

Copyright, Compromise, and Legislative History by Jessica D. Litman, 72 Cornell Law Review 857 (1987)

Flowcharting the First Amendment by Fred C. Zacharias, 72 Cornell Law Review 936 (1987)

The First Amendment in Modern Garb: Retaining System Legitimacy - A Review Essay of American Broadcasting and the First Amendment by Stanley Ingber, 56 George Washington Law Review 187 (1987)

The "Public Interest or Concern" Test-Have We Resurrected a Standard That Should Have Remained in the

Defamation Grave-yard? by De Vonna Joy, 70 Marquette Law Review 647 (1987)

The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law by Michael Sanders, 70 Marquette Law Review 673 (1987)

The Supreme Court and Commercial Speech: New Words with an Old Message by Donald E. Lively, 72 Minnesota Law Review 289 (1987)

Avoidable Consequences in Defamation: The Common-Low Duty to Request a Retraction by Donna M. Murasky, 40 Rutgers Law Review 167 (1987)

Posadas de Puerto Rico Associates v. Tourism Company: Rolling the Dice with Central Hudson, 40 Rutgers Law Review 241 (1987)

[ELR 9:12:23]